TATAB INDUSTRIES SDN. BHD. (IN RECEIVERSHIP)

v.

SU THIAM HOCK @ SU THEN HACK

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-1075-92]
25 NOVEMBER 1993

TORT: Negligence - Solicitor and client - Appeal filed out of time - Client lost chance of setting aside Garnishee Order and recovering attached monies - Whether solicitor negligent - Whether solicitor required specific instructions to appeal - Whether client entitled to full recovery.

This was an application by the plaintiff to enter final judgement against the defendant for a sum of RM 131,967.33 or alternatively to enter judgement with damages to be assessed. The action arose out of the allegation by the plaintiff that while acting as their solicitor to recover the said sum of monies, which was under attachment, the defendant was acting negligently resulting in the plaintiff losing all chances of recovering the said monies.

The facts were that by a Garnishee Order to show cause dated 15 March 1988 all monies due and accruing from a bank to a third party was ordered to be attached by the Court. The same monies, however, had earlier been assigned by the said third party to the plaintiff. The plaintiff retained and instructed the defendant to file the necessary application to intervene and to set the order aside which the defendant did on 14 April 1988. The learned Senior Assistant Registrar (SAR), after hearing the application on 27 October 1988, dismissed the same on 15 November 1988 with the result that the Garnishee Order, thereafter, became absolute.

By a letter dated 20 November 1988 the defendant informed the plaintiff that the notice of appeal against the aforesaid decision of the learned SAR had been filed. This representation was a mistake as in fact no such notice had, by then, been filed. It was not until 23 November 1988 that an appeal was filed by the defendant to the Judge in Chambers but by that time it was already out of time and the appeal was dismissed on that preliminary point.

Held:

[1] The defendant is personally liable as had specific conduct of this matter throughout. It is not open for the defendant to say that the retainer ended with the dismissal of the plaintiff's application to intervene and to set aside the Garnishee Order before the learned SAR and in view of the letter dated 20 November 1988 he also cannot be heard to argue that there were no specific instructions from the plaintiff to appeal against that decision.

[2] As it was the negligence of the defendant that caused the plaintiff to lose all their chances of intervening, setting the Garnishee Order aside and getting the stated amount back, the plaintiff must be held entitled to judgemnet without the necessity of a trial. That the actual mistake is attributable to or lies with the clerk of the defendant is immaterial.

[3] Even if the notice of appeal had been filed on time, there is no guarantee that the plaintiff would have been allowed to intervene, or if allowed to, would have succeeded in getting the Garnishee Order set aside. It is therefore not appropriate that the plaintiff be made entitled to summary judgement for the sum stated although the defendant is personally liable. The plaintiff is only entitled to summary judgement in terms of the alternative application with damages to be assessed by the learned SAR.

[Application in the alternative only granted].

Cases listed at the end of the judgment as "Cases referred to":

Bumi Gajah Agencies (sued as firm) v. Khintan Enterprise Sdn. Bhd. & 2 Ors. [1989] 2 CLJ 991 ***(foll)***
Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 MLJ 400 ***(refd)***
Yong & Co. v. Wee Hood Teck Development Corporation [1984] 2 MLJ 39 ***(foll)***
Miranda v. Khoo Yew Boon [1968] 1 MLJ 161 ***(foll)***
New Ching Kee v. K.E. Hilborne & Ors. [1978] 2 MLJ 48 ***(refd)***
Avel Consultants Sdn. Bhd. & Anor. v. Mohamed Zain Yusof & Ors. [1985] 2 MLJ 209 ***(refd)***
Dummer v. Brown & Anor. [1953] 1 QB 710 ***(refd)***
Neo Chan Eng v. Koh Yong Hoe [1960] 26 MLJ 291
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd. [1972] 1 MLJ 168 ***(refd)***
Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9 ***(refd)***
Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 2 MLJ 183 ***(refd)***
Gunung Bayu Sdn. Bhd. v. Syarikat Pembinaan Perlis Sdn. Bhd. [1987] 2 CLJ 9 ***(refd)***
Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd. [1989] 1 MLJ 40 ***(refd)***
Chiew Soon @ Chiew Chun Soon v. Tay Tai Aun [1990] 1 CLJ 469 ***(refd)***

Pertubuhan Keselamatan Sosial v. Chin Chee Kuang & 2 Ors. [1991] 3 CLJ 2183 ***(refd)***
Schindler Lifts (M) Sdn. Bhd. v. Sarawak Properties Sdn. Bhd. & Anor. [1992] 3 CLJ 1473 ***(refd)***

For the plaintiff - J. Kannaperan; M/s. Shearn Delamore & Co.
For the defendant - R.K. Nathan; M/s. R.K. Nathan & Co.

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:
As pleaded in the statement of claim and averred in the affidavit supporting the application for summary judgment, the plaintiff is a limited company under receivership and the defendant is an advocate and solicitor practising under the name and style of Messrs. T.H. Su & Co.

By a Garnishee Order to show cause dated 15 March 1988 obtained in Kuala Lumpur High Court Civil Suit C4-23-2492-87 (hereinafter "the Garnishee Order"), it was ordered that all monies due and accruing from the United Asian Bank Berhad (hereinafter "UAB") to Khintan Enterprise Sdn. Bhd. (hereinafter "KE") be attached to recover a judgment obtained by Bumi Gajah Agencies (hereinafter "BGA") against KE. The monies due and accruing to KE from UAB had earlier been assigned to the plaintiff pursuant to a principal agreement dated 20 May 1987, an agreement to sell goods on credit also on the same date, and an assignment of debt dated 27 July 1987, all entered into between the plaintiff and KE.

After these three transactions, which had also been handled by the defendant, the plaintiff had instructed the defendant to make the application to intervene and to set aside the Garnishee Order. The plaintiff contends that it was an implied term of the said agreement by the defendant to act as solicitor that it was the duty of the defendant to exercise all due care, skill and diligence in and about the prosecution of the matter.

The defendant had on 14 April 1988 filed an application for an order that the plaintiff be allowed to intervene in the garnishee proceedings and to set aside the Garnishee Order. The application was heard by the Senior Assistant Registrar on 27 October 1988 who on 15 November 1988 had dismissed the application resulting in the garnishee order being made absolute requiring the UAB to pay directly to BGA the sum of RM131,967.33 due and accruing to KE.

The defendant did file an appeal against that decision to a Judge in Chambers on 23 November 1988 but it was dismissed on the preliminary point that it was lodged out of time. The appeal to the Supreme Court was similarly dismissed on 28 November 1989. On 20 February 1989, UAB had, pursuant to the Garnishee Order absolute on 15 November 1988, paid RM131,967.33 to BGA.

By summons in chambers filed on 1 October 1992, the plaintiff had applied to enter final judgment against the defendant for RM131,967.33 with interest at 8 per cent per annum on that amount from 20 February 1989 to the date of realisation or alternatively to enter final judgment against the defendant with damages to be assessed with interest at 8 per cent per annum from the date of judgment to the date of realisation.

Learned Counsel for the defendant had argued that since the statemant of claim was based on negligence and not on contract, the plaintiff must prove that the defendant owed a duty of care, that there had been a breach of that duty, and that the plaintiff suffered damages because of that breach. He added that the plaintiff had to show that the retainer subsisted throughout the entirety of the proceedings and that the plaintiff had given instructions to the defendant on a continuous basis. He further stated that whether the defendant, who was sued personally, alone or his entire firm had specific conduct of the matter, whether there was vicarious liability, or whether the firm was a partnership, were all triable issues and summary judgment was therefore not appropriate.

A perusal of the affidavits and their annexures show quite clearly that the defendant had been retained by the plaintiff in 1987 and had acted for them for the relevant agreements and the subsequent garnishee proceedings. The contemporaneous correspondence throughout the period that followed up to the time this problem arose indicates that the defendant should be held responsible for the matter being dealt with properly up to the end.

It is not open, to my mind, for the defendant to say that the retainer ended with the dismissal of the plaintiff's application to intervene and to set aside the Garnishee Order before the learned

Senior Assistant Registrar. He also cannot be heard to argue that there were no specific instructions from the plaintiff to appeal against that decision especially in the light of the defendant's letter dated 20 November 1988, which was five days after the learned Senior Assistant Registrar's decision, referring to a teleconversation between representatives of both the plaintiff and the defendant on 16 November 1988 and categorically stating that a notice of appeal had been filed. On the date of the letter, the filing of the notice of appeal would have been on time but the defendant had only done so three days after that letter resulting in it being out of time. In *Miranda v. Khoo Yew Boon* [1968] 1 MLJ 161, the Federal Court had ruled that having accepted instructions to, and having filed the notice of, appeal it was not open to the plaintiff there to argue that there was no solicitor and client relationship between him and the defendant just because the defendant had failed to pay the plaintiff a due instalment in his fees. The situation is so much stronger here as fees are not even in issue. In *Yong & Co. v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, the Federal Court had observed that "while the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied discretion left him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria.".

Now, why did the defendant file the notice out of time when he, acting as solicitor, was responsible for this action to be taken expeditiously? It surely cannot be attributed to the plaintiff not giving instructions to appeal as we know, from the defendant's letter to the plaintiff referred to earlier, that they had a teleconversation one day after the decision and the notice of appeal was supposed to have been filed on the same date as the letter, as stated therein, which would make the filing on time.

The reason given by the defendant to the Judge in Chambers for the late filing in the appeal was that it was the mistake of the solicitor's clerk which reason was rejected both by the High Court, in *Bumi Gajah Agencies (sued as firm) v. Khintan Enterprise Sdn. Bhd. and United Asian Bank Berhad and Tatab Industries Sdn. Bhd.* [1989] 2 CLJ 991, on the grounds that a solicitor's negligence cannot merit the exercise of judicial discretion to extend the time, and the Supreme Court subsequently. Next, is it essential for the plaintiff to show that if the notice of appeal had been filed on time, the plaintiff would surely have been allowed to intervene and the Garnishee Order would certainly be set aside? In my view, the answer would be in the negative as there is no guarantee as to what the decision would have been. The only difference is that if the notice of appeal had been filed on time, whether or not the plaintiff wins or loses the appeal, our instant problem would not have arisen whereas because it had been filed out of time, the plaintiff had lost, as can be seen from what had actually taken place, all their chances of intervening, setting the Garnishee Order aside and getting the stated amount garnished back. In this regard, my considered opinion was that the plaintiff was entitled to judgment without the necessity of a trial.

However, since even if the notice of appeal had been filed on time, it still does not mean that the plaintiff would have been allowed to intervene or if allowed to, would have succeeded in getting the Garnishee Order set aside partially or totally, I was not inclined to grant summary judgment to the plaintiff for the sum stated. I had therefore granted the order in terms in the alternative in that the plaintiff was entitled to summary judgment against the defendant, who is personally liable as he had specific conduct of this matter throughout, but damages were to be assessed accordingly by the learned Senior Assistant Registrar at a later date. In these circumstances, I had ordered that the plaintiff was only entitled to half the costs of this application.